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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 524.

JAMES LARKIN AND WILLIAM J. McNAMARA,

PLAINTIFFS IN ERROR,

VS.

DAVID N. UPTON, PATRICK A. LARGEY, AND HOWARD H. ZENOR,

DEFENDANTS IN ERROR.

In Error to Supreme Court of Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

M. KIRKPATRICK AND
WM. M. STEWART,
Counsel for Plaintiffs in Error.

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DAVID N. UPTON, PATRICK A. LARGEY, AND HOWARD H. ZENOR, DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error on Motion to Dismiss or Affirm.

I.

The ground of the motion to dismiss the writ of error in this case is stated to be "that the cause being a proceeding to quiet title and for an injunction against adverse claims, is essentially a proceeding in equity and should have been brought up by an appeal and not by writ of error."

To this we reply: First—This is not an equitable action or proceeding.

That although the cause has, in some particulars, assumed the form of an action to quiet title, yet in its nature and

essential character it is not such an action; nor is it an equitable action or proceeding at all. It is, in fact, a statutory action or proceeding brought under section 2326 of the Revised Statutes of the United States. The defendants in the action had filed in the United States Land Office their application for a patent for the Smelter Lode Claim, and published the notice required by law, and the plaintiffs in the action having filed their adverse claim as claimants of the Comanche lode, brought this action under the provisions of section 2326 to determine the right of possession to the area in conflict between the locations, to the end that the officers of the Land Department might be advised as to which of said claimants was entitled to a patent for said area.

It is a step in pursuance or continuation of the proceedings provided by the laws of the United States for obtaining a patent to mineral lands on the public domain. That this is the character of the action appears from the averments of the complaint and amended complaint. (Record, pp. 5, 7.)

Now to the action to quiet title it is essential that the plaintiff be in possession at the commencement of the action. But in this statutory action such possession is not necessary; it is only necessary that the plaintiff have and file in proper time an adverse claim to the premises or some portion thereof, for which the defendant has made application for a patent, and commence the action in due time thereafter. The allegation in the complaint in this action is that the plaintiff is in possession is surplusage, the failure to prove which would not defeat the action. And this in effect is expressly ruled by this Court and the distinction pointed out between such an action as this and the equitable action to quiet title, in the Montana case of Wolverton *v.* Nichols, 119 U. S. 485, 488.

Another peculiarity of this class of action arises from the terms of the act of Congress of March 3, 1881 (Supplement to Rev. Stats. p. 609), providing—

"That if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed for either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title."

Here is a statute which not only makes both parties to the controversy actors, and sets aside the ordinary rule that upon failure of the plaintiff to establish his title, the defendant is entitled to judgment; but which also by its terms confers the absolute right of trial by jury in such action and makes the verdict, not advisory merely, but conclusive upon the court—features unknown to the action to quiet title, and to equitable actions generally.

Thus, while from deference to form, this class of actions has, in Montana, taken on the semblance of the equitable action to quiet title, the remedy is, in reality, wholly statutory, a step in the proceedings prescribed by the law of Congress to obtain a patent to mineral lands, and more nearly allied in its characteristics to legal than to equitable remedies.

The practice in Montana is to try this class of cases in the same manner as the trial of an issue at law. The right to a jury trial is recognized unless waived by the parties; instructions to the jury are given, excepted to, and reviewed as though given in an action at law, and the action is declared to be a statutory one.

Mattingley *v.* Lewisohn, 8 Mon. 259, 263.

O'Donnell *v.* Glenn, 8 Mon. 248, 254.

Flick *v.* Gold Hill Company, 8 Mon. 298.
Gamer *v.* Glenn, 8 Mon. 371, 380.
Freezer *v.* Sweeney, 8 Mon. 508.

In Colorado, where an action in form of ejectment had been brought in such a case, the Supreme Court said :

"To support an adverse filed under section 2326 R. S. U. S., an action in the nature of ejectment is undoubtedly proper. Some of the rules pertaining to ejectment are, however, modified on the trial of such causes. For instance, no proof by plaintiff of an ouster is necessary ; and upon proper showing otherwise, the action may be maintained, even though plaintiff be himself in the actual possession and occupancy of the disputed premises, or even if the premises at the time the suit is commenced be not in the actual possession of any person."

Becker *v.* Pugh, 9 Col. 589, 593.
Morrison's Min. Rights, 184, and cases.

In a subsequent action of like character in which the complaint had assumed an equitable form, the same court said :

"But it is contended on behalf of the defendant in error that this is a chancery proceeding under the pleadings, and that the verdict of a jury is only advisory and may be disregarded by the court ; that since the court found the issues for the plaintiff, and that he was 'the owner of the premises against all the world except the United States,' the proper issues have been adjudicated. The position is not maintainable. This is not an action under the State statute to determine the mere question of the right of possession, but an action authorized by the laws of Congress to determine the right of a party to be invested with the fee. The main question to be determined is, as we have seen, which party, if either, has established title to the disputed premises, regardless of the particular form of the

action, or which party may be in possession at the time of the commencement of the suit. In such action the parties are entitled to jury trials, and consequently to correct instructions."

And the court goes on to quote the language of this Court in Wolverton *v.* Nichols, supra.

Manning *v.* Strehlow, 11 Col. 451, 455.

And see

Thomas *v.* Chisholm, 13 Col. 105.

McGinnis *v.* Egbert, 8 Col. 41.

Second. But this being a case tried by jury in a Territorial Court, it is on that ground solely, regardless of its character otherwise, properly brought here by writ of error.

The statute provides "that the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial Courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe."

18 Statutes, part 3, p. 27.

This statute was construed by this Court in Hecht *v.* Boughton, 105 U. S. 235. Chief-Justice Waite delivering the opinion, said:

"This is a writ of error to the Supreme Court of the Territory of Wyoming to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss because the case should have been brought here by appeal, and not by writ of error."

After quoting the statute, the Chief-Justice continued:

"This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the Territorial Courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come by writ of error and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been or not a trial by jury."

In Montana legal and equitable remedies are administered in the same action; but the Court said the statute clearly applied to all Territorial Courts, regardless of this circumstance.

And the use of the words "judgments and decrees" in the statute shows that the rule was intended to apply whether the subject-matter was of legal or equitable cognizance.

See also

Stringfellow *v.* Cain, 99 U. S. 610.
Cannon *v.* Pratt, 99 U. S. 619.

The practice has been in conformity with this construction.

Dahl *v.* Raunheim, 132 U. S. 260.
Wolverton *v.* Nichols, 119 U. S. 485.
Noonan *v.* Caldonia Co., 121 U. S. 393.

These were all actions brought under section 2326 Revised Statutes United States, and were in form actions to quiet title. Dahl *v.* Raunheim and Wolverton *v.* Nichols, Montana cases, were tried by a jury and were brought here by writ of error. Noonan *v.* Caldonia Company, a Dakota case, was tried by the court without a jury, and came up on appeal.

We submit, therefore, that the motion to dismiss is not well taken.

II.

In the event, however, that the Court shall overrule the motion to dismiss, there is the further motion that the Court, summarily and without further argument or consideration, affirm the judgment in this cause, and this upon the ground that "the bills of exception, six in number, which are scattered in wild confusion over pages 111 to 116 of the Record, absolutely present no question upon which this Court can pass."

But if this were granted it does not follow that the judgment should be affirmed; for besides the bills of exception, there may be, in the language of the Chief-Justice in Hecht *v.* Boughton, "question of law otherwise presented by the record," which may merit consideration. In this case there is the question whether upon the special findings and conceded facts the judgment can be sustained; and our contention will be not only that the judgment in favor of defendants in error should be reversed, but that this Court should, upon the record as it stands, direct judgment to be entered for plaintiffs in error. This is a grave question which, in our opinion, is worthy of argument and careful consideration, and we commend it to the attention of counsel for defendants in error. This and other questions of law arising upon the record, we will be prepared to present at the proper time, and at present would respectfully suggest to the Court that the cause involves questions which, in our judgment, cannot, with justice to the parties, be disposed of upon a summary motion like this.

M. KIRKPATRICK AND
WM. M. STEWART,
of Counsel for Plaintiffs in Error.

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HOWARD H. ZENOR.

In Error to the Supreme Court of the Territory of Montana.

Motion to Dismiss or Affirm and Brief in Support Thereof.

M. F. MORRIS,
Of Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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In Error to the Supreme Court of the Territory of Montana.

Motion to Dismiss or Affirm.

The defendants in error, David N. Upton, Patrick A. Largey, and Howard H. Zenor, by M. F. Morris, their attorney, come and move the Court to dismiss the writ of error sued out in this cause, for the reason that the cause, being a proceeding to quiet title and for an injunction against adverse claims, is essentially a proceeding in equity and should have been brought up by appeal and not by writ of error.

The said defendants further come and move the Court to

affirm the decree in said cause, in the event that the Court should determine that it has jurisdiction in the premises; and for grounds of this their motion they say that the questions raised by the bills of exceptions in the cause have been frequently determined, and therefore need no further argument; and that in fact no substantial questions are raised.

M. F. Morris,
Attorney for Defendants in Error.

Brief in Support of Motion to Dismiss or Affirm.

I.

STATEMENT.

This is a suit to quiet title to certain mining property in the Territory, now State, of Montana, brought by the defendants in error as complainants against an adverse claim of the plaintiffs in error as defendants, and for a perpetual injunction against the claim. That this is the character of the suit is apparent from the complaint (Rec., p. 5), from the statement on the motion made below for a new trial (Rec., p. 9), and from the decree of the territorial court (Rec., p. 13).

The complaint alleged that the complainants were the owners and possessors of the property in controversy, subject to the paramount title of the United States; that the defendants claimed a part of the tract adversely, and had instituted proceedings to procure a patent therefor; and that such claim and the proceedings of the defendants in the premises were without just right. And the prayer of the complaint was for a discovery of all the claims of the defendants, for an adjudication of their invalidity, and that the defendants should thereafter be perpetually barred from asserting them. There is a territorial statute which authorizes such proceedings, but the proceeding itself is the well-known equity proceeding to quiet title and to enjoin the assertion of adverse claims.

In accordance with the provisions of the statutes of Montana, similar in this regard to those of most, if not all, of the other Territories and of the State of California, from which the provisions were originally taken, the court below sum-

moned a jury to aid it in the determination of the questions of fact involved in the case. The jury was directed to return special findings, and also a general verdict, and both the special findings and the general verdict were in favor of the complainants. Thereupon the court adopted the findings as its own conclusions on the questions of fact; and then proceeded to decree in favor of the complainants in accordance therewith and with the prayer of the complaint.

The rulings of the trial court upon the testimony offered by the parties before the jury, and its action upon the instructions requested to be given to the jury, were made the basis of the bills of exceptions taken in the case, of which there are six (Record, pp. 111–116); and these, together with objections to the special findings of the jury, a motion for a new trial, and a statement upon such motion, in accordance with the territorial practice, were taken to the Supreme Court of the Territory for review, and that court affirmed the decision of the district court; and now the cause is brought here on writ of error.

II.

BRIEF OF ARGUMENT.

1.

The defendants in error respectfully submit that an appeal, and not a writ of error, was the proper proceeding in this case, and that therefore the writ of error should be dismissed.

The cause is one of equity, and not of common-law cognizance; and the rule of this Court is too well established to be controverted now, that while common-law causes, when brought to this Court, must be so brought by writ of error,

equity causes must be brought here by appeal. Of the numerous cases sustaining this rule we cite only a few.

United States *vs.* Haley, 118 U. S., 233.
Wolf *vs.* Hamilton, 108 U. S., 15.
Hecht *vs.* Boughton, 105 U. S., 235.
United States *vs.* Railroad Co., 105 U. S., 263.
Hayes *vs.* Fisher, 102 U. S., 121.
Stringfellow *vs.* Cain, 99 U. S., 610.
Blease *vs.* Garlington, 92 U. S., 1.
Marin *vs.* Lalley, 17 Wall., 14.
Brewster *vs.* Wakefield, 22 How., 118.

There could be no question about the application of the rule to the present case, were it not for the abolition by the territorial legislature of the difference in the forms of procedure in common law and equity, to which this Court gave its sanction in the case of *Hornbuckle* vs. *Toombs* (18 Wall., 648), after much controversy upon the subject. The Court in that case determined that it would not refuse to entertain jurisdiction on account of such blending of the forms of common law and equity.

But the Court has decided also, that, although the formal distinctions in procedure have been abolished by the territorial legislation, the essential distinction between common law and equity is not changed, and that the distinction is not to be disregarded in the removal of causes to this Court for review. In the case of Basey *vs.* Gallagher (20 Wall., 670), decided about a year after the case of *Hornbuckle* vs. *Toombs*, and which, like the present, to which it is similar in many respects, was also a case from Montana, this Court, by Mr. Justice Field, said:—

"By the organic act of the Territory, the district courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court; and, under the legislation of the Territory, the modes of pro-

cedure up to the trial or hearing are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state in ordinary and concise language the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury or pass upon them without any such intervention, must depend upon the jurisdiction to be exercised. If the remedy sought be a legal one, a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury; and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought; as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages a jury would be required; but upon the propriety of an injunction the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may

undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the Supreme Court of that State that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence. That court only held that the findings, when not objected to in the court below and the judge was satisfied with them, could not be questioned for the first time on appeal."

Basey *vs.* Gallagher, 20 Wall., 670.

The case of Basey *vs.* Gallagher was a suit for an injunction to restrain the diversion of a water-course. A jury was summoned in it, in accordance with the territorial statute, to determine the questions of fact involved. The jury made its special findings. The court disregarded some of the special findings, and rendered its decree in favor of the complainants. Its action was sustained by the Supreme Court of the Territory, and then the case was brought here *by appeal*, and on appeal this Court affirmed the decision and pronounced the opinion a portion of which has been cited.

That case would seem to be decisive of the present one. If the jury trial in that case was merely an incident in it, made necessary, it is true, by the territorial statute, but still only advisory to the court, and the case itself was essentially one of equity cognizance, and properly brought up by appeal, the conclusion seems to be inevitable that the present case, also being likewise one of equity cognizance, should have been brought up by appeal, and not by writ of error.

2.

Probably it is proper, in view of some subsequent decisions of this Court, presently to be noted, to refer briefly to the act of Congress of April 7, 1874 (18 Statutes, part 3, p. 57), entitled "An act concerning the practice in the territorial courts, and appeals therefrom," which was passed to meet some of the difficulties arising from the blending of common law and equity procedure by the territorial legislation of the several Territories, adverted to in the case of *Hornbuckle* vs. *Toombs* and previous cases in this Court. That act, among other things, provides as follows:—

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed, or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal."

Commenting upon this statute, this Court, by Chief Justice Waite, said in the case of *Hecht* vs. *Boughton* (105 U. S., 235):

"This is a writ of error to the Supreme Court of the Territory of Wyoming to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss, because the case should have been brought here by appeal, and not by writ of error.

"The second section of the act of April 7, 1874 (18 Stat., pt. 3, p. 27), is as follows: (Here act is cited, as above.) This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been or not a trial by jury (*Stringfellow* vs. *Cain*, 99 U. S., 610). We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances, the form of proceeding is not of so much importance as certainty about what is to be done."

And in that case the motion was granted, and the writ of error was dismissed. The decision is summarized in the statement of the syllabus, that "an appeal is the only form of proceeding by which this Court can review the judgment or decree of a territorial court in a case where there was not a trial by jury." But we submit that it is not to be inferred from this that in all cases in which there has been a trial by jury the only mode of review is by writ of error. Such was not the intention of the statute, and such is not the conclusion to be drawn from the case of *Hecht* vs. *Boughton*. Otherwise appeal in equity might be considered as abolished.

The intention of the Legislature was plainly, first, to give effect to the provision of the seventh amendment to the Constitution, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than accord-

ing to the rules of the common law ;" and, secondly, to provide for the review of all other questions, whether at common law or in equity, by way of appeal. It certainly was not and could not have been the intention of Congress to provide that, if a court of equity should, for any reason, have determined to call in a jury to aid it in the determination of some matters of fact involved in a suit pending before it, and should have taken the verdict of such jury to "enlighten its conscience," according to the expression of the Court in Basey *vs.* Gallagher, *supra*, thereafter the suit became inflexibly a common-law suit, a "case of trial by jury," to be reviewed only upon writ of error. If that was the intention, then appeal in equity is abolished ; for there are very few cases, indeed, in equity in which there are not controverted questions of fact, and in which, therefore, the intervention of a jury is not proper under the territorial practice. And we are then confronted with this peculiar condition of things, that, by the territorial statute, a jury is required to be summoned, yet the Court may wholly disregard its findings, but all the same the case must be brought up here on writ of error, when the jury has disappeared from the case and there are no bills of exceptions and there can absolutely be no review. In other words, the case must be brought up on writ of error ; and yet it is impossible to review the case when it is brought up. Assuredly Congress did not mean anything of this kind. What Congress did mean seems to be plain enough ; and that is, to leave appeals in equity as they were, subject only to the requirement of a finding of facts, instead of the whole testimony ; to leave writs of error to review judgments consequent upon the verdicts of jury in ordinary common-law cases precisely as they were, and precisely as it was necessary to leave them under the Constitution ; and to provide for the removal of all other common-law cases by appeal as in equity. Unless this is the meaning of the statute, inextricable confusion must ensue from it.

The statute requires that "*cases of trial by jury*" shall be

brought up "by writ of error." Equity causes cannot, under any proper construction of these words, be regarded as "cases of trial by jury," even though a jury may have supervened in them to "enlighten the conscience" of the Court. When a jury has so intervened, it is not their action, but the action of the court itself, whether enlightened by them or refusing to be guided by them, which is brought up for review; and this it seems impossible to bring up in any other way than by appeal.

It is respectfully submitted, therefore, that the writ of error in this case should be dismissed.

3.

Assuming, however, for the present, that this is a "case of trial by jury" within the meaning of the statute, and that it has properly been brought up on writ of error, the circumstances of the case justify the joinder of a motion to affirm the judgment with the motion to dismiss.

According to the decision in *Hecht* vs. *Boughton* (105 U. S., 235), already cited, "upon the writ of error the court is confined to the bills of exceptions," and is not to consider the testimony at all. Now, the bills of exceptions in this case, six in number, which are scattered in wild confusion over pages 111 to 116 of the Record, absolutely present no question whatever upon which this Court can pass.

Taking the bills in their numerical order, the first exception (Rec., p. 111) is taken to a question the propriety or impropriety of which there is nothing whatever to show: for there is no recital whatever of any previous testimony, no reference to the conditions and circumstances under which the question was asked; and the question itself, the location of a claim upon a map, is one that would be innocent and proper almost under any circumstances.

The second exception is based upon the offer in evidence of a location notice (Rec., p. 144), because there was an alleged discrepancy between it and the oral testimony of one

of the parties, a discrepancy which was wholly immaterial, if it existed, and the existence of which even does not follow from the statement of the bill of exceptions.

The third exception (Rec., p. 112) is based upon the refusal of the court to admit some testimony of the defendants; and there is absolutely nothing to show whether the testimony was relevant or irrelevant, or to show whether there was error or not in the ruling.

Exceptions four and five (Rec., p. 115) have reference to the giving of certain instructions asked for by the plaintiffs. These instructions are found on pages 103 and 104 of the Record; and without going over the whole testimony in the case it is impossible to determine whether the instructions are proper or not.

The same criticism may be made of the sixth exception (Rec., p. 111), which is based upon objections to some of the findings of the jury. These findings appear on pages 100, 101, and 102 of the Record; but only by an examination of the whole testimony in the case, covering ninety pages of the printed record (p. 9 to 99), could it be determined, if even then, whether these findings were or were not justified by the evidence. Now this is an examination which the Court should not be called upon to make, and which unquestionably it will decline to make.

So that even a casual inspection of the bills of exceptions in this case discloses the fact that they actually present no question whatever for review by this Court; and that even upon a hearing upon the merits, if such a hearing could be had, the Court would be compelled, in the absence of anything upon which to act, to affirm the decision of the territorial court.

It is submitted that, under these circumstances, it is eminently proper for the Court to affirm the judgment upon motion.

M. F. Morris,
Of Counsel for Defendants in Error.

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DEFENDANTS IN ERROR.

No. 524.

Brief for Plaintiffs in Error.

M. KIRKPATRICK AND
WM. M. STEWART,
Of Counsel for Plaintiffs in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

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Brief for Plaintiffs in Error.

I.

Prior to March, 1882, plaintiffs in error, defendants below, and who are herein styled defendants, filed their application in the United States Land Office at Helena, in the then Territory of Montana, for a patent to the Smelter Lode Claim, situated in Silver Bow county, Montana; to which application defendants in error, plaintiffs below, and herein styled plaintiffs, having filed an adverse claim as owners of a conflicting location called the Comanche Lode Claim, commenced this action, in March, 1882, in the Second Judicial District Court of the Territory, to determine the right of possession to the premises in

conflict between the two locations, which embraced, as alleged in the complaint, an area of 7.79 acres.

Upon the first trial in the district court a verdict and judgment were rendered in favor of the plaintiffs. On appeal, the Territorial Supreme Court reversed the judgment and ordered a new trial. (See 5 Montana R. 600.) The court in its opinion says: "The Comanche claim was located January 19, 1879. The discovery shaft of the Comanche was within the limits and boundaries of the Shannon claim, as surveyed and patented at that time. At the time of the location of the Comanche claim, there had not been any discovery of a vein or lode within its limits." Being a location without a discovery, the court held it void, and further held that it was not cured or made effectual by a discovery claimed to have been made on the claim after the date of location. The point decided is fairly stated in the syllabus, as follows:

"A location of a mining claim void at the time it was made, because of no discovery of a lode, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located."

The second trial of the cause resulted again in a verdict and judgment for the plaintiffs, which on appeal was affirmed by the Supreme Court of the Territory (7 Montana R. 449; also Record, pp. 121–129), and to review this latter judgment the defendants sued out this writ of error.

At the second trial plaintiffs undertook to establish that the locators of the Comanche at the time of location had discovered a vein in the discovery shaft; that said shaft was not, as stated by the Supreme Court on the first appeal, wholly within the limits of the older and patented

Shannon claim, but was partly on both claims, extending about 19 inches in width south of the dividing line between these adjoining claims, and that some part of the apex of the vein had been found within this 19 inches on the Comanche ground, and plaintiffs claimed that this discovery rendered the location valid.

The defendants, on the other hand, contended that the Comanche discovery shaft as originally constructed lay wholly north of the dividing line, and therefore altogether on Shannon ground; that if any part of the shaft was now found south of the line, it had been widened by plaintiffs since the location and former trial, and that no part of the apex of the vein was found south of that line, and therefore the Comanche being a location without a discovery, was invalid, and the smelter location, subsequently made, gave the better right to the area in conflict between those claims.

Thus the controversy turned upon the validity of the Comanche location, and that depended upon whether the locators thereof had made such a discovery of a vein or lode as would sustain their location.

There were special findings made by the jury in response to two sets of interrogatories submitted to them by the court, one at request of plaintiffs and one at request of defendants, and in connection with these the jury returned a general verdict for the plaintiffs. (Record, pp. 100–102.)

II.

The findings of the jury in response to plaintiff's interrogatories No. 1 and 2 (Record, page 100), show with sufficient clearness that a portion only of the apex of the Comanche vein at the point of discovery, was upon the Comanche claim as located, the remainder of the apex

was north of the south side line of the older and patented claim called the Shannon, and therefore on the Shannon claim.

The first interrogatory to which the jury responded "yes," inquired whether the Comanche locators, prior to location, discovered a mineral vein in their discovery shaft.

The second, to which the jury also responded "YES," inquired if ANY PART of such vein at the discovery point was south of the south boundary line of the Shannon claim as patented and within the limits of the Comanche as located.

These findings establish that a part of the apex of the vein at the point of discovery was within the Comanche, and a part within the adjacent patented Shannon claim.

Such was the theory of the plaintiffs' case. They did not claim that the whole apex was upon or within the Comanche location. They only sought a finding that a PART of the apex was within their location; conceding that the remainder was upon the Shannon claim. They were satisfied with this, and upon this fact in connection with the marking of the boundaries and the record of the claim based their contention that the Comanche was a valid location.

That this was the theory of the plaintiffs it further appears from instruction No. 3, requested by plaintiffs and given by the court in the following words:

"To make a valid location of a lode claim based on a discovery in a shaft, it is not necessary that the whole of such shaft should be within the limits of the ground located, but it is sufficient if ANY PORTION OF SUCH VEIN OR LODE as is required to be discovered, is at the point of discovery within the limits of the claim located, although some other portion of such vein or lode be outside the limits of such claim in the discovery shaft or elsewhere." (Record, p. 103.)

And again from instruction No. 8, asked by plaintiffs and given by the court, in which after defining the apex of a vein, the jury were told "that if the locators of the Comanche lode claim, at the time of the location thereof, found, or if from the work done by others prior thereto they could see at any point within the limits of said location a lode or vein, the top or apex of which was within the said lines of their location, then in such case they made a discovery of a lode or vein such as the law requires to be made to entitle them to locate the ground, and it is *wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of their said location; any amount of it would suffice, however small, either as to the amount of the vein or its apex within the limits of the said location.*" (Record, p. 104.)

The jury were instructed at the request of the defendants (Instruction No. 2, Record, page 105), that the discovery must be made on the claim located, and that a discovery on ground previously appropriated and then held by others would not sustain a location, and that if the Comanche discovery was made on the Shannon lode claim the Comanche location was invalid.

And again in defendants' instruction 3, the jury were told that if the patent of the Shannon claim included the Comanche discovery, the Comanche location was void. (Record, p. 105.)

And again in defendants' instruction No. 6, the jury are instructed that if the plaintiffs discovered a vein the top or apex of which lay within the limits of the Shannon claim as patented, they (the plaintiffs) acquired no right by virtue of such location. (Record, pp. 105–106.)

And again in defendants' instruction No. 7, the jury are told that the exterior limits of the location must *enclose* the apex in order to give the claimant a right to it. (Record, p. 106.)

In connection with this, however, the jury were explicitly instructed at the plaintiffs' request as pointed out above that it was not essential to the validity of the Comanche location that the whole of the apex of the vein should be within the lines of the location, and that it was sufficient if ANY PORTION of the vein or lode at the point of discovery was within the lines of the claim, although some other portion thereof might be outside the claim, in the discovery shaft or elsewhere; and "that it was wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of plaintiffs' location; that any amount of it would suffice, however small, either as to the amount of the vein or its apex within the limits of said location." (Record, pp. 103-104.)

Taking the special findings together it is apparent that a portion only of the apex of the so-called Comanche vein was, at the point of discovery, on the Comanche location, the remainder being upon the patented Shannon claim; that is to say, north of the south side line of the Shannon, which bounded the Comanche on the north.

That the Supreme Court of Montana so understood the facts appears from their opinion in this cause (7 Mon., p. 458, and Record, p. 126). The court there say:

"The next error alleged is that the evidence shows that the Shannon lode claim as patented, includes the discovery of the Comanche lode claim, and counsel for appellants cite Gwillim *v.* Donnellan, 115 U. S. 45. In that case the discovery relied on by the plaintiffs was entirely included within the boundaries of a claim that was patented after the plaintiffs' location; but in the case at bar testimony was introduced by plaintiffs tending to show that only a portion of plaintiffs' discovery shaft is included within the Shannon claim, and that the other portion is included within the lines of the Comanche lode claim. The jury was instructed as to the law upon this point at appel-

lants' request. They were told that the discovery 'must have been made upon the claim located, but if the ground upon which the claim is located is appropriated ground, that is to say, ground that has been previously located, and is at the time held as a quartz lode claim by others, then such a discovery will not sustain a location, and any location made by virtue thereof will be void. And if you find in this case that the discovery of the Comanche lode claim was made upon the Shannon lode claim, then you will find that the location of the Comanche lode was void, and the plaintiffs acquired no rights thereunder.' And there were other instructions to the jury to the effect that if the discovery shaft of plaintiffs was within the Shannon lode claim, as patented, then plaintiffs could not recover.

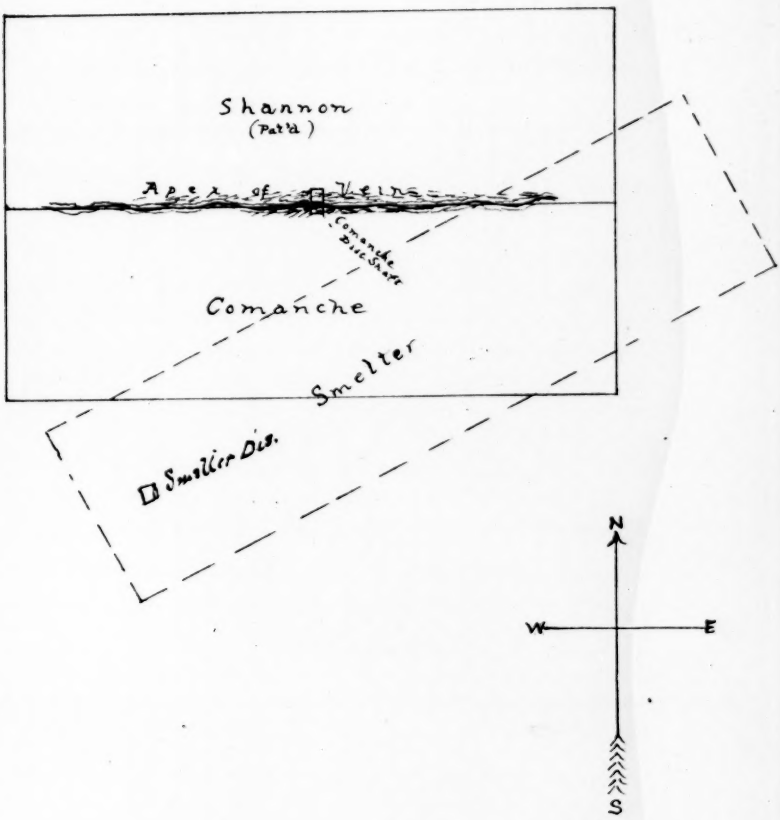
"THE JURY FIND SPECIFICALLY that a PORTION of the discovery is south of the south boundary line of the Shannon claim as patented and within the lines of the Comanche as located. There is evidence to sustain the finding, and such a finding of fact is sufficient to show a valid discovery; therefore the verdict of the jury cannot be disturbed on that ground." (Record, p. 126.)

Again, the jury find (Record, p. 102) that the vein does not cross the side lines of the Comanche claim, or, as the Supreme Court of Montana interprets the finding, "that the general course of the vein corresponds with the length of the claim." (Record, p. 128.)

The situation, therefore, was as follows: Of the three claims, the Shannon was oldest in location (see Bill of Exceptions No. 1, Record, p. 111; also, p. 99), the Comanche next, then the Smelter. The Shannon bounds the Comanche on the north. The south side line of the Shannon, which is also the north side line of the Comanche, runs directly through the shaft called the Comanche discovery shaft in such manner that the shaft, with the exception of a strip about nineteen inches wide, is included within the Shannon lines. The vein has a south-

erly dip in its descent into the earth. The boundary line between the Shannon and Comanche divides the apex of the vein, leaving a portion thereof within the Shannon claim, and as the vein in its course or strike on the surface corresponds with the length of the claims, we conclude from the facts found that throughout the length of the claims the boundary line continues to divide the apex in the same manner, leaving at all points a portion of the apex north of that line and within the patented Shannon claim.

The situation of the Shannon and Comanche claims in relation to each other and to the apex of the vein is approximately shown in the following plan :


Shannon
(Pat'd)
Apex of Vein
Comanche Blue Shaft
Comanche
Smelter
Smelter Dis.
N
W
E
S

Upon this state of facts the Supreme Court of Montana, holding with the defendants in error, ruled that the Comanche location was a valid location, distinguishing the case from Gwillim *v.* Donnellan, 115 U. S. 45, on the ground that in that case the discovery was ENTIRELY included within the boundaries of a patented claim, while in this it was only partly included within a patented claim; and approving the instructions given by the trial court to the jury wherein they were told that if ANY PORTION, however small, of the apex of the vein at the point of discovery was found within the boundaries of the Comanche location, it was sufficient to give validity to that location. (Record, p. 126.)

In this we submit there was manifest error. It is essential to a valid lode location that the discovery be made not only within the lines of the location, but upon a vein or lode to which the locator can by virtue of his location acquire title. If the vein or lode has been previously appropriated, and is at the time of the location in question held and owned under an existing and valid prior location, or by virtue of a patent from the United States issued upon such a location, such a discovery confers no rights on the locator of the junior claim.

In Gwillim *v.* Donnellan, 15 U. S. 47, this Court said:

"The location is made on the surface, and the discovery must be of a vein or lode, the top or apex of which is within the limits of the surface lines of such location. A patent for the land located conveys the legal title to the surface, and that carries with it the right to follow a discovered vein, the apex of which is within the limits of the grant downwards, even though it may pass outside the vertical side lines of location. The title to the vein depends on the RIGHT to the occupancy or the ownership of the apex within the limits of the right to the occupation of the surface."

And again (p. 49):

"If, when one enters on land to make a location, there is another location in full force which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second."

And again:

"The discovered lode must be within the limits of the location which is made by reason of it. IF THE TITLE TO THE DISCOVERY FAILS, SO MUST THE LOCATION WHICH RESTS UPON IT."

Now the question is, Was the Comanche discovery of and upon a vein which was then unappropriated and open to location, or was it upon a vein already appropriated, and to which the locators of the Comanche could acquire no title by virtue of their location? Did that portion of the vein lying south of the dividing line between the Shannon and the Comanche as well as that portion lying north of it belong to the Shannon, or was it still public and unappropriated mineral property at the date of said Comanche location?

We submit that it is well settled that a vein so situated is a part of the elder and patented claim and belongs in its entirety thereto.

In Argentine Mining Company *v.* Terrible Mining Company (122 U. S. 478) this Court ruled that "when there are surface outcroppings from the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein." And the same principle is decided in effect in Richmond Mining Company *v.* Rose (114 U. S. 576, 586).

In Bullion Beck and Champion Mining Company *v.* Eureka Hill Mining Company, the same point was elabo-

rately discussed and considered and the same conclusion reached by the Supreme Court of Utah. (5 Utah Rep., pp. 3, 49. S. C., 11 Pacific Rep. 515.)

In the last cited case the apex did not outcrop on the surface, but was found a hundred feet beneath the surface. And it is plainly an immaterial circumstance, in the application of the principle, whether the apex is upon or beneath the surface, there being portions of the apex on both sides of the perpendicular plane of the dividing line.

See, also, North Noonday Co. *v.* Orient Co., 6 Sawyer, 299.

S. C., 1 Fed. Rep. 522.

Rose *v.* Richmond M. Co., 17 Nev. 25, 65.

Flagstaff Co. *v.* Tarbet, 98 U. S. 463.

Therefore the Comanche discovery being made upon the apex, or part of the apex of a vein which, at the time of said discovery and location of the Comanche, was not open to appropriation, being in its entirety a part of the older Shannon claim or location, a vein to which the locators of the Comanche could acquire no title by virtue of their location, it results that the Comanche location was invalid and void *ab initio*.

"The location is the plaintiffs' title; if good he can recover, if bad he must be defeated. If the title to the discovery fails, so must the location which rests upon it." "The loss of the discovery was the loss of the location."

(Gwillim *v.* Donnellan, 115 U. S. 45, 50.)

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of loca-

tion upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

(Belk *v.* Meagher, 104 U. S. 279, 284.)

"The discovery must be made upon public mineral lands, and not upon a vein or upon grounds belonging at the time to other persons."

(Upton *v.* Larkin, 5 Montana, 600.)

This fact being established by the special findings, and also admitted in the theory of the plaintiffs' case that the Comanche discovery was upon a part of the apex of a vein, the remainder of the apex at said point of discovery being within the lines of the Shannon claim; and it appearing that the Shannon was the older location and patented at the time of said discovery, it follows that the vein in its entirety belonged to the Shannon claim, and that the pretended discovery of the Comanche thereon was not such a discovery as would support or give validity to the location of that claim.

And in view of the above-mentioned facts the instruction of the trial court to the jury, wherein they were told that if any portion, however small, of the apex of the vein at the point of discovery was found within the boundaries of the Comanche location it was sufficient to give validity to that location, was misleading and erroneous, and in approving such instruction (Record, p. 126) the Supreme Court of Montana Territory erred.

That the jury were afterwards told that the exterior lim-

its of the location must enclose the apex (Record, p. 106) in order to give the claimant a right to it, did not remedy the error; for this simply presents a case of contradictory instructions; in one of which the jury are told that if any portion, however small, of the apex was found within the Comanche, it was sufficient to give validity to that location; and in the other they were told that the exterior limits of the location must enclose the apex. Or rather taking the two instructions together as applied to the facts, the jury were in effect instructed that if the surface lines of the Comanche inclosed any portion, however small, of the apex at the point of discovery, it was sufficient to give validity to that location, although the remainder of the apex at said point lay within the lines of an older valid location, to wit, the patented Shannon claim; which was clearly erroneous.

It is true the jury were instructed (Record, p. 105) that the discovery must have been made "upon the claim located; but if the ground on which the discovery is located is appropriated ground, that is to say, ground that has been previously located, and is at the time held as a quartz lode claim by others, then such discovery will not sustain a location, and any location made by virtue thereof will be void; and if you find in this case that the discovery of the Comanche lode claim was made upon the Shannon lode claim, then you will find that the location of the Comanche lode claim was void, and the plaintiffs acquired no rights thereunder."

The jury were also instructed (Record, p. 105) that the "ownership or title to a vein is determined by its apex or top, and although one may discover a vein within the limits of the ground claimed, yet if the top or apex lies without his claim, he will acquire no title thereto, and in this case, if plaintiffs discovered a vein, the top or apex of

which lies within the limits of the Shannon lode claim as the same is decribed in the patent issued to Charles X. Larabie, then the plaintiffs can claim no rights by virtue of such discovery, although such vein may so far depart from a perpendicular in its downward course as to enter the ground claimed as the Comanche lode claim."

They were also instructed (Record, pp. 108–9) "that the vein itself as discovered must be on unoccupied mineral land of the United States, and on the Comanche surface ground and within its limits. Any vein discovered within the surface lines of the patented Shannon lode claim would not entitle plaintiffs to record their claim, and without recordation there is no title or right to possession in the plaintiffs."

And also (Record, p. 109) "that the south boundary line of the Shannon lode claim was and is now established by the patent, and if the vein and discovery of the Comanche lay north of that, and within the side lines and end lines of the Shannon lode claim, then there can be no such lode claim known to the law as the Comanche."

These instructions have reference to the contention of defendants at the trial, that no part of the discovery or discovery shaft of the Comanche was at date of location on the Comanche, but were within the lines of the Shannon as patented. They have no reference to and do not embrace the contention and theory of plaintiffs that a portion only of the apex of the vein was within the surface lines of the Comanche, and that the discovery made upon this part of the apex was sufficient to support the location, although the remainder of the apex at said point lay within the older and patented Shannon claim—a contention sustained in matter of fact by the jury in its special findings, and in matter of law by the trial court and the Supreme Court of the Territory.

Taking these instructions in connection with instructions 3 and 8 given at request of plaintiffs (Record, pp. 103–104), and applying them to the facts, the jury were in effect told that if the whole discovery and discovery shaft of the Comanche, or if the whole apex of the vein discovered lay north of the dividing line on Shannon ground, then the Comanche location was invalid and void; but that if the surface lines of the Comanche inclosed any part, however small, of the apex of the vein, and the Comanche discovery was made upon this part, it was sufficient to give validity to that location, notwithstanding the remainder of the apex at or adjacent to said point of discovery lay within the lines of an older valid location, to wit, the patented Shannon claim; which is a repetition of the same error before pointed out.

Again, we do not overlook the fact that one of the interrogatories submitted to the jury (Record, p. 101) was as follows:

"1st. If the jury find that the locators of the Comanche lode claim discovered a vein in the hole or shaft claimed as the Comanche discovery, then the jury will answer: Was the top or apex of such vein within the limits of the Shannon claim as patented?

"Answer. No."

This answer is to be construed, with reference to the same contention of the defendants, that the whole of the discovery, shaft and apex, were at the time of the discovery within the lines of the Shannon as patented. And so considered the reply is in effect that the whole of the apex was not on the Shannon, but that a part of it, as previously found, was upon the Comanche. They were not asked if any part of the apex was on the Shannon; but whether THE APEX of the vein was on the Shannon. To this they

answered, No. But they had already found that a part of the apex was south of the south line of the Shannon, or on the Comanche, and this implied necessarily that the remainder of the apex was north of that line, or on the Shannon. So that taking the two together the fair construction is that on both sides of the line, and therefore on both claims, an apex was found. And so the Supreme Court of Montana understood the findings, for they say the boundary line between the claims "ran directly through the discovery shaft of the Comanche in such manner that the shaft, with the exception of a strip of about 19 inches wide, is included within the Shannon lode." (Record, p. 126.)

With reference to the Smelter lode claim, the regularity and validity of its location are fully established by the findings of the jury. (See Record, p. 101, findings 2, 3, 5.)

Our contention therefore is, that upon the special findings as they stand, properly construed, the defendants and not the plaintiffs were entitled to judgment. The general verdict should, and but for the misleading and erroneous instructions of the court doubtless would, have been for the defendants. The special findings are inconsistent with the general verdict, and in such case the statute of Montana declares that "the former shall control the latter, and the court shall give judgment accordingly." (Compiled Statutes of Montana, pp. 128–9, sec. 275.)

And we submit that this Court should now do justice in the premises, and direct judgment to be entered for the defendants.

But if this be not granted, we would urge that at least the judgment be reversed, and a new trial ordered. For it is manifest that as regards the defendants there has not been a fair trial of the case. The instructions of the court given at request of the plaintiffs, and particularly

instructions No. 3 and 8 (Record, pp. 103, 104), when considered in connection with the relative situation and dates of location of the Shannon and Comanche claims, are clearly erroneous. Taking all the instructions and considering them together they are confused, contradictory, erroneous, and calculated to mislead, and they doubtless did mislead the jury.

III.

The complaint and amended complaint (Record, pp. 5, 7) do not state facts sufficient to constitute a cause of action, and for this reason the judgment should be reversed. The action is brought under section 2326 of Revised Statutes of the United States, relating to the manner of obtaining patents to public mineral lands. Where an application for patent is made, an adverse claimant resisting such application must file in the Land Office his adverse claim within the sixty-days' period of publication of notice of the application; failure to do so is a waiver of his adverse claim. (Sec. 2325.)

The adverse claimant having filed his claim must, within thirty days thereafter, commence a suit in a court of competent jurisdiction to determine the right of possession, and a failure to do so operates as a forfeiture of his adverse claim. (Sec. 2326.)

The right of action depends upon the doing of these things within the limited times, and the complaint should show, by direct averment, compliance with the requirements of the statute. It was so ruled by the Supreme Court of Montana Territory, and that a complaint which lacked such averments was bad on general demurrer.

(Mattingley *v.* Lewisohn, 8 Mon. 259.)

In the complaint in the present case there is only the

general allegation that the defendants "have applied to the United States for a patent" to the premises in question. (Record, p. 5.)

In the amended complaint (Record, p. 7) it is further alleged that the application was made prior to the bringing of this suit, and that "within the statutory time as required by act of Congress plaintiffs filed in said Land Office their adverse claim to said premises, and thereupon brought this suit to try the rights of parties to said lode claim described in their complaint."

Under the rule laid down in the case above cited this is insufficient. As to filing the adverse claim, no facts are alleged from which the conclusion could be drawn that it was filed within the sixty days of publication; the conclusion only is alleged that it was filed in "due time."

And as to the commencement of suit there is not even an allegation that it was commenced in due time, nor any facts alleged from which the conclusion could be drawn that it was commenced within thirty days after filing the adverse claim.

IV.

The locators of the Comanche claim testified on the trial that in making the location they marked the west end corners by putting up stakes thereat. Plaintiffs then offered in evidence the Comanche location notice, to the admission of which defendants objected on the ground that in said notice it is stated that the west end corners of the location are marked and designated by pine trees. But the court overruled the objection and allowed said location notice to be read to the jury. (See defendant's bill of exceptions, No. 2, Record, p. 114; Comanche notice of location, Record, p. 91.)

The requirement of law is that the location must be distinctly marked on the ground so that its boundaries can be readily traced. Can it be reasonably maintained that the boundaries of a claim can be readily traced, the corners of which are marked by stakes, when the notice of location calls for trees? We submit that as a matter of law a location based on such a notice should be held invalid.

M. KIRKPATRICK AND
WM. M. STEWART,
of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED,
JAN 23 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES LARKIN AND WILLIAM J. McNAMARA,
PLAINTIFFS IN ERROR,
v.
DAVID N. UPTON, PATRICK A. LARGEY, AND HOWARD H. ZENOR,
DEFENDANTS IN ERROR.

No. 175.

Error to the Supreme Court of the Territory of Montana.

BRIEF FOR THE DEFENDANT IN ERROR.

S. S. BURDETT,
Of Counsel for the Defendants in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES LARKIN AND WILLIAM J. MCNAMARA,
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DAVID N. UPTON, PATRICK A. LARGEY, AND HOWARD H. ZENOR,
DEFENDANTS IN ERROR.

No. 175.

Error to the Supreme Court of the Territory of Montana.

Brief for the Defendants in Error.

STATEMENT OF THE CASE.

This action was brought March 7, 1882, in the District Court, Second Judicial District, Silver Bow county, Montana Territory, by David N. Upton *et al.*, who are the defendants in error here, under section 2326 of the Revised Statutes of the United States, to determine the right of possession of certain mining ground claimed by them under a location made January 19, 1879 (Record, p. 91),

and known as the Comanche Quartz Lode mining claim, situate in the Summit Valley mining district, Silver Bow county, Montana, for which mining ground the defendants below, James Larkin *et al.*, who are the plaintiffs in error in this Court, had filed in the United States land office at Helena, Montana, an application for a patent, claiming the same under a location made May 23, 1881 (Record, p. 92), of the Smelter Mining claim. (Record, pp. 5, 7.)

The answer of the defendants was a general denial of the plaintiffs' complaint. (Record, p. 6.)

There was a verdict for the plaintiffs. (Record, p. 102.) A motion for a new trial was filed by the defendants (Record, p. 4), which being overruled (Record, p. 116), and judgment rendered in favor of the plaintiffs (Record, p. 113), the defendants carried the case to the Supreme Court of the Territory of Montana, where the judgment of the district court was in all things affirmed. (Record, p. 129.) The defendants thereupon sued out this writ of error.

ARGUMENT.

I.

The trial court did not err in permitting the witness Upton to testify that he knew where the corners and boundary lines of the Shannon Lode claim were at the time of the Comanche discovery and location, and that the south line of said Shannon Lode was about one hundred feet north of the discovery shaft of the Comanche.

The object of this proof was to fix the locus of said discovery shaft. It was competent to do this by showing where that shaft was situated with respect to any known point or object. For this purpose it was utterly immaterial whether the Shannon claim had been patented or not.

The testimony of the witness merely went to establish a fact. If the defendants, in order to defeat the Comanche location, desired to prove that the patented lines of the Shannon Lode were south of the old lines of that location and took in the discovery shaft of the Comanche claim, their proper course was to show the fact on cross examination of the witness, or by the introduction of testimony in defence.

II.

The court did not err in permitting the plaintiffs to introduce in evidence the copy of the location notice of the Comanche Lode claim.

Section 2324 of the Revised Statutes of the United States, which confers authority upon the miners of each mining district to make regulations governing the location, manner of recording, &c., of mining claims, declares that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

The first ground of the objection of the plaintiffs in error to the admission of said location notice is that said notice is not "in accordance with the law."

The record of the Comanche location having been made, it was competent for the plaintiffs to show that the requirements of the statute had been complied with so far as a reference connecting the location with a natural object or permanent monument was concerned.

The notice as recorded was the best evidence of its contents. Whether the Silver Bow quartz mill and the Gambetta Lode claim referred to in the notice were natural ob-

jects or permanent monuments was a question for the jury under instructions of the court.

"It is not for the court to say, by merely looking at a record or declaratory statement what are or what are not permanent objects or monuments. That is a matter of proof."

Russell v. *Chumasero*, 1 Pacific Reporter, 713.

In *Gamer et al* v. *Glenn* (20 Pacific Reporter, 654), the supreme court of Montana held that a description in a declaratory statement—notice of location—referring to a large boulder at the west end of the Tim Lode, and containing other references to the ground staked off by the locators, is good, notwithstanding no such lode as the "Tim" existed, and this because the boulder may be in itself a natural object sufficient to identify the claim in that direction.

In *Hammer* v. *Garfield Mining and Milling Co.* (130 U. S. 291), the notice of the location of the Garfield Lode described that lode as "located about fifteen hundred feet south of Vaughn's Little Jennie mine, and described and located on the 4th day of July, 1880." To the introduction of that notice in evidence objection was taken that it did not contain such a description of the property as was required by law, and did not refer to such natural objects or permanent monuments as would identify the claim. This Court, after referring to the provisions of section 2324 of the Revised Statutes, concerning a "reference to some natural object, or permanent monument," and declaring that the law means "when such reference can be made," said: "We agree with the court below that the Little Jennie mine will be presumed to be a well-known natural object, or permanent monument, until the contrary appears."

In the case at bar the location notice of the Comanche

Lode, after stating that the claim is situated in Summit Valley mining district, Deer Lodge county, Montana, about half a mile in a northwesterly direction from the Silver Bow quartz mill, declares that "the adjoining claims are the Gambetta Lode claim on the east."

This reference to the Gambetta Lode is much more specific and certain than was the reference to the Little Jennie mine in the case above referred to. There the reference was to an object *about* fifteen hundred feet south.

Here the Gambetta Lode claim is given as *adjoining* the Comanche on the east. The reference in this notice to the Silver Bow quartz mill is certainly as specific as that to the Little Jennie mine, while superadded to that reference is that to the Gambetta Lode. There was, therefore, before the court a location notice, the record of which contained such a description of the claim "located by reference to some natural object or permanent monument as will identify the claim." Being in accordance with the law, it was competent evidence of the fact of the location.

III.

The other objection to the admission of the notice of location was that it showed and recited that the west end corners of the claim were marked by pine trees and not by stakes or posts, as testified to by the witness Upton, one of the locators of the claim.

The introduction in evidence of such notice of location at that stage of the case could work no possible harm to the defendants. It had already been shown that the Comanche Lode claim had been distinctly marked on the ground so that its boundaries could be readily traced. The witness Upton had sworn that all the corners of

the claim were marked by stakes; that "the corners on the west end were marked just like the others." It was after this testimony had been given that the certified copy of the location notice was offered in evidence. It was admissible for consideration by the jury in connection with the evidence already introduced.

Coleman v. *Davis*, 21 Pacific Reporter (Colorado), 1018.

Surely the introduction of the location notice could not harm or injure the defendants. If it had any effect whatever, it was to contradict or weaken the testimony which the plaintiffs had already introduced to show the marking of the boundaries of the claim. Viewed in that light the location notice militated in favor of the defendants.

There is no statute of the United States and none of Montana which requires that the corners or ends of a mining claim shall be marked in any special manner, or that the boundaries of the claim, as marked on the ground, shall be specified or recited in the notice of the location when the same is recorded in the records of mining claims. The requirment of the law is that the "location must be distinctly marked *on the ground*, so that its boundaries can be readily traced."

The purpose of the record is to direct the inquirer to the place where the claim is located, and not to show its precise boundaries as marked on the ground.

Gamer v. *Glenn*, 20 Pacific Reporter, 654.

Where the record of a mining claim contains a reference to some natural object or permanent monument, a defective description in the record may be cured if the stakes or monuments on the ground identify the claim. This is a matter of proof.

Russell v. *Chumasero*, 1 Pacific Reporter, 713.

The laws of the United States do not require that the markings on the ground shall be described in the record of a mining claim.

Jackson v. *Dines*, 21 Pacific Reporter (Colorado), 918.

"The congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules."

Jupiter Mining Co. v. *Bodie Consolidated Mining Co.*, 11 Federal Reporter, 666, 680.

The laws of Montana have "in no way added to the requirements of the act of Congress."

Flick v. *Gold Hill and L. M. Min. Co.*, 20 Pacific Reporter, 807, 808.

The question before the trial court was, had the plaintiffs, having made a valid discovery of mineral on the ground claimed by them, so distinctly marked their location on the ground that its boundaries could be readily traced. The court left that question to the jury, expressly instructing that "the jury are to determine whether a claim has been sufficiently marked to indicate to those honestly seeking to ascertain the limits of the same ground claimed by the locator." (See the 12th instruction given at the request of the defendants, Record, p. 107.)

The admission of the location notice was not erroneous. Its only effect under the law was to show in the record of that notice, and for the purpose of identifying the *locus* of the claim, a reference to some natural object or permanent monument. It being admissible for that purpose, it could not be excluded because of an alleged discrepancy between its recitals and the testimony already given by the witness Upton as to what marked the northwest and e southwest corners of the claim, especially as

there was no contention in the trial court that the defendants were in anywise misled by anything in the record of said notice contained.

A location certificate, although fatally defective in matter of description or otherwise, may well be considered as an element tending to show good faith on the part of the locator in attempting to comply with the law in making his location.

Strepy v. *Stark*, 5 Pacific Reporter (Colorado), 111, 114.

A judgment will not be reversed because of the introduction of evidence which worked no prejudice to the party objecting to it.

Gilbert v. *Moline Plough Co.*, 119 U. S. 491.
Lancaster v. *Collins*, 115 *Id.* 222.
Dist. of Columbia v. *Woodbury*, 136 *Id.* 450.

IV.

The district court did not err in refusing to permit the defendants to show that what they had found in their discovery shaft at the depth to which they had sunk it before locating the Smelter claim had, from work done and developments prosecuted subsequently to such location, been proved to be a well-defined vein.

The plaintiffs below claimed under a location of the Comanche Lode made January 19, 1879; the defendants under a location of the Smelter Lode made May 23, 1881. The junior locator had filed application for patent, whereupon the senior locator adversed that application and brought this suit to determine the right of possession to the ground in controversy. The question, therefore, was one of priority, depending upon a valid location made on mineral

ground. The plaintiffs had proved a discovery of a vein within the limits of their location and that they were in possession. The offer of the defendants to show that what they had found in the shaft sunk by them, and upon which they based their junior location of the Smelter Lode, had, by subsequent developments, turned out to be a well-defined vein, was utterly immaterial. Had the proof been admitted it could not have affected the question at issue, to wit: the right of the plaintiffs to recover on the strength of their prior discovery and possession.

As a matter of law, the right of the Smelter claimants to assert title under their location depended entirely, in the presence of an adverse claim, upon a valid discovery of mineral made prior to the location under which they claimed. A discovery made after location will not affect the rights of other parties.

Jupiter Mining Co. v. *Bodie Consolidated Mining Co.*, 11 Federal Reporter, 666.

Besides this, there was no attempt to show in the trial court that the defendants had not made a discovery of mineral prior to their location of the Smelter Lode, and even if the district court had erred in excluding the testimony offered by the defendants, that error was a harmless one and was cured by the finding of the jury that the defendants did discover at the time of their location, within the limits of the Smelter Lode, a vein with at least one well-defined wall.

As was remarked by the supreme court of Montana, "the purpose of the offer is evident: it was to enlist the sympathy of the jury."

V.

The contention of the plaintiffs in error in the court below was that the first instruction given at the request of

the plaintiffs below led the jury to suppose that the original discovery of mineral on the Comanche claim would be sufficient to entitle them to recover, even though that discovery was made upon ground which, prior to the commencement of this action, had been patented to others than the plaintiffs or those under whom they claimed.

As a general proposition of law the instruction as given was entirely correct.

It was not misleading, for the jury were expressly instructed, at the request of the defendants, that if they found that the discovery of the Comanche Lode claim was made upon the Shannon Lode claim, then the jury would find that the location of the Comanche Lode claim was void and the plaintiffs acquired no rights thereunder; that if the patent of the Shannon Lode claim included the vein at discovery on the Comanche Lode claim, then the Comanche Lode claim was destroyed thereby, whether such discovery was within the limits of the Shannon Lode claim as originally located or not.

The sixth instruction given at the request of the defendants was still more direct and specific. It was as follows:

"The ownership of or title to a vein is determined by its top or apex, and although one may discover a vein within the limits of ground claimed, yet if the top or apex lies without his claim he will acquire no title thereto; and in this case if plaintiffs discovered a vein the top or apex of which lies within the limits of the Shannon Lode claim as the same is described in the patent issued to Charles X. Larrabie, then the plaintiffs can claim no rights by virtue of such discovery, although such vein may so far depart from a perpendicular in its downward course as to enter the ground claimed as the Comanche Lode claim."

Thus the Court plainly informed the jury that a dis-

covery made on the *dip* of the vein in Comanche ground was not sufficient.

The second instruction given at the request of the plaintiffs was not erroneous. It simply told the jury that if the plaintiffs had made a valid location, and were in possession of the premises at the time of the commencement of the action, they should find for the plaintiffs. The jury was, as already referred to, very explicitly instructed as to what under the law constituted a valid location. The instruction went no further than to inform the jury what their verdict should be in the event of their finding from the evidence a certain condition of facts.

The third instruction given at the request of the plaintiffs told the jury that to make a valid location of a lode claim based on a discovery in a shaft it was not necessary that the whole of the shaft should be within the limits of the ground located. In other words, the jury was instructed that if any portion of the vein or lode, such as the law requires to be discovered, is at the point of discovery within the limits of the claim located, that is sufficient. This instruction was not erroneous, especially when taken in connection with the direction of the court that to sustain a location there must have been within the ground located the discovery of a vein, the top or apex of which lies within the ground claimed. The finding of the jury was that the locators of the Commanche claim did, prior to the location of said claim, "discover in the shaft claimed by them as discovery shaft a vein or crevice of quartz or ore" bearing mineral.

VI.

The request of the defendants that the court would charge the jury that if they found the plaintiffs' location

of the Comanche Lode claim to be void they need not stop to consider the defendants' location of the Smelter claim, but would find for the defendants, was properly denied.

Jackson v. *Roby*, 109 U. S. 440.

Section 2326 of the Revised Statutes declares that where an adverse claim is filed during the period of publication of an application for a mineral patent, all proceedings on such application, except the publication of such notice, "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." It further declares that the question to be decided in proceedings brought thereunder is the "right of possession," and that after final "judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof," may, among other things, file a certified copy of the judgment roll in the local land office, "whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant appears, from the decision of the court, to rightfully possess."

The instruction asked by the defendants entirely eliminated from the consideration of the jury the very question which the statute declares shall be tried, namely, a possession *held rightfully* under the mineral law. To constitute such a rightful possession the defendants were bound to show a valid discovery and a valid location made on the public lands. In the absence of such a showing there was nothing upon which to base a judgment that the defendants "rightly possess" this mining ground or any portion thereof.

Bay State Silver Mining Co. v. *Brown*, 21 Federal Reporter, 167.

The court had, in the sixth instruction already given at the request of the plaintiffs, informed the jury that if they found from the evidence that the title to the ground in controversy had not been established in either the plaintiffs or the defendants, they should render a verdict accordingly.

That instruction was entirely consistent with the statute, while that asked for by the defendants and refused by the court was utterly inconsistent with it, for it not only would have confused the jury, but would have taken from them the very question of fact of which, so far as any rights of the defendants were concerned, the judgment of the court should be predicated, namely, the validity of the location under which they claimed. The instruction as requested assumed, as a matter of both law and fact, that even though the plaintiffs had failed to show the validity of their possession, then the right of the defendants to a patent as applied for was to be taken as conclusive, irrespective of the proofs.

The assumption that an applicant for a patent on a mining claim is entitled thereto can only be indulged where no adverse claim is filed during the period of publication. (Section 2325, Revised Stat. U. S.)

The law on this branch of the case was correctly stated in the twenty-sixth instruction, given at the request of the defendants (Record, p. 109), where the court told the jury that if they found from the evidence that the plaintiffs had not made a valid location of the Comanche Lode, but that there had been such a location of the Smelter Lode claim, then they should find for the defendants.

VII.

The principal contention of the plaintiffs in error in this Court is in support of their exception to the eighth

instruction given by the trial court at the request of the plaintiffs, wherein, after stating to the jury that "if the locators of the Comanche Lode claim, at the time of the location thereof, found, or if from the work done by others prior thereto they could see at any point within the limits of said location a lode or vein, the top or apex of which was within the said lines of their location, then in such case they made a discovery of a lode or vein such as the law requires to be made to entitle them to locate the ground," further instructed the jury that it is "wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of their said location; any amount of it would suffice, however small, either as to the amount of the vein or its apex within the limits of said location."

It is further argued by the plaintiffs in error that inasmuch as the first interrogatory to which the jury answered "Yes," inquired, "Did the locators of the Comanche Lode claim, prior to the location of said claim, discover in the shaft claimed by them as discovery shaft a vein or crevice of quartz or ore, with at least one well-defined wall on a lode or vein of rock in place bearing gold, silver, or other valuable mineral deposits?" their answer "Yes" to the next interrogatory, namely, "Was any part of such vein or lode discovered by the locators of said Comanche claim at the point of discovery, south of the south boundary line of the Shannon Lode claim as patented, and within the limits of said Comanche Lode claim as located?" establishes the fact that a part of the apex of the vein at the point of discovery was within the Comanche and a part within the adjacent patented Shannon claim, and that the Comanche location was therefore made on a vein or lode previously appropriated, and conferred no rights upon the locators thereof. We deny this.

We submit that there was no finding by the jury that any part of the vein relied upon to sustain the Comanche location was within the Shannon ground as patented. Their finding was confined solely to the vein so far as the Comanche ground was concerned, and is not limited as to quantity.

If the defendants below, the claimants of the Smelter location, in order to defeat the Comanche location relied on the appropriation of the Comanche vein at the point of discovery by the patent issued on the Shannon claim, it was incumbent upon them to establish the fact that the *top* or *apex* of the vein discovered by the Comanche claimants was within the limits of the Shannon claim as patented. They did try to do so and failed. The first question put to the jury by the defendants was, "If the jury find that the locators of the Comanche Lode claim discovered a vein in the hole or shaft claimed as the Comanche discovery, then the jury will answer, Was the top or apex of such vein within the limits of the Shannon claim as patented?"

"Answer. *No.*" (Record, p. 101.)

Thus the jury not only found that the plaintiffs had discovered a *vein or lode* within the limits of the Comanche claim as located, but that the *top or apex* thereof was *not* within the Shannon claim as patented.

The court did not err in charging the jury that if the locators of the Comanche claim found at any point within the limits of said location a lode or vein, the top or apex of which was within the lines of said location, then, in such case, they made a discovery of a lode or vein such as the law requires to be made to entitle them to locate the ground, and that it is "wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of said location; any amount

of it would suffice, however small, either as to the amount of the vein or its apex within the limits of said location."

If it were true, as is contended by the other side, that a part of the top or apex of this vein is in the Shannon ground—a fact which is expressly negatived by the special findings of the jury—the question which at once presents itself is, Can the plaintiffs in error be heard to assert that the owners of the Shannon claim have the right to extend their side line outwards on the surface of the ground so as to take in and include that portion of the top or apex of a vein lying beyond their side line as patented, or did said side line, like the end lines, become a vertical bounding plane?

Section 2320 of the Revised Statutes fixes the maximum extent of a mineral location both along the length of the vein or lode and on each side of the middle of the vein at the surface, and section 2324 declares that the location must be distinctly marked on the ground so that its boundaries can be readily traced. Section 2322 enacts that the locators of all mining claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

These sections taken together mean no more and no less than that although the locator of a mineral claim is confined to the possession and enjoyment of the surface ground within the lines of his location, he may, nevertheless, follow every vein or lode in its vertical dip downwards outside of his side lines, provided its top or apex *lies within*

his surface lines: in other words, the apex must be *enclosed* within the lines of the claim or there is no right to follow on the dip. The side line on the surface marks the limit to which he may go in ascertaining or finding the top or apex of any vein or lode just as distinctly as do the end lines on the surface mark the spot where he must stop on the strike or onward course of such vein or lode.

In the case at bar there is not even a pretence that any vein, the *top or apex* of which is on the Shannon ground, departs from a perpendicular in its downward course and passes into the Comanche claim.

If the court below was in error in holding that if the plaintiffs had discovered a lode or vein the top or apex of which was within the lines of their location, and that any amount, either as to vein or apex within the limits of such location, would suffice, and, on the other hand, the contention of the plaintiffs in error here is correct, it necessarily follows that, although the patent for the Shannon claim cannot and did not, under the law, carry the title to any portion whatever of a vein the top or apex of which lies outside of the patented lines of that claim, nevertheless the effect of that patent is to defeat the Comanche location by working the loss of a vein or lode the top or apex of which was found by the jury to be outside of the lines of the Shannon claim as patented and within the Comanche surface ground.

Counsel for the plaintiffs in error say in their brief that as the "Comanche discovery was upon a part of the apex of a vein, the remainder of the apex at said point of discovery being within the lines of the Shannon claim; and it appearing that the Shannon was the older location and patented at the time of said discovery, it follows that the vein in its entirety belonged to the Shannon claim, and that the pretended discovery of the Comanche thereon

was not such a discovery as would support or give validity to the location of that claim."

The unsoundness of this contention, so far as the facts are concerned, is apparent from the record. The Comanche location was made January 19, 1879 (Record, p. 91). The patent on the Shannon Lode claim was issued October 14, 1880 (Record, p. 94). Besides this, the finding of the jury was that the Comanche location was made on a vein or lode south of the south boundary of the Shannon Lode claim as patented, and that the top or apex of that vein was not within the limits of the Shannon claim as patented.

The contention of counsel on the other side is, therefore, precluded by the verdict.

This is not a case between two conflicting claimants seeking to enforce the rights of one or the other of them to follow on its vertical dip downwards and outside of his side lines a lode or vein, the top or apex of which lies within the surface lines of his location. The question here is, Was the Comanche discovery a valid one when made? Or, putting it conversely, and to meet the contention of the plaintiffs in error, Is there sufficient in this record to warrant this Court in reversing the judgment below, basing such reversal upon the ground that, as a matter of law, the issue of the patent on the Shannon Lode claim carried with it the entire top or apex of the vein claimed as the Comanche discovery, and this, notwithstanding the finding of the jury that the top or apex of the vein claimed by the defendants in error to support their location was not within the limits of the patented Shannon claim?

The position of the other side, as they put it, is that as the "Comanche discovery was upon a part of the apex of a vein, the remainder of the apex at said point of discovery being within the lines of the Shannon claim," the vein in *its entirety* belonged to the Shannon claim.

But in reaching such a decision this Court must find that the side lines of the Shannon claim do not confine and limit the owners of that claim to veins, lodes or ledges, the "top or apex of which lie inside of such surface lines extended downward vertically" but that they may go horizontally beyond those side lines, and assert title, under their patent, to a vein or lode, the top or apex of which is found by the jury to lie outside of their side lines, and this, too, in a controversy to which those claiming under the Shannon patent are not parties, and in the absence of all proof or averment that the vein which counsel argue is on Shannon ground *departs from a perpendicular* in its downward course and passes outside the vertical side lines of the surface location of that claim.

Not one of the cases cited by the plaintiffs in error sustain such a holding. In every one of them the vein at discovery had been *wholly* embraced in some patented claim, or the question involved was as to the right to follow the vertical *dip* of a vein, the top or apex of which was found to lie *wholly within* the surface lines of the party claiming such right.

The question for decision in *Bullion Beck & Champion Mining Co.* v. *Eureka Hill Mining Co.* (11 Pacific Reporter, 515) was, as stated by the court on page 522 of the opinion, "whether the first locator having the apex of a vein entirely within the surface lines of his claim for a portion of its length, and the remaining portion partly within and partly without, and within the surface lines of another claim, owns the whole lode within the end lines of his claim."

That is an entirely different question from the one at bar. There, the apex of the vein was *entirely within* the surface ground of the first locator. Here, the contention of the plaintiff in error goes no further than to assert

that by implication of the finding of the jury *a part only* of the top or apex of the vein is within the Shannon side lines. Any expression by the court in that case beyond the decision of the question involved was therefore mere *dictum*, and is not authority in the present case.

In *Richmond Mining Co.* v. *Rose* (17 Nevada, 25) there is no support for the broad apex theory. That issue was not raised. On the contrary, counsel consented that the court should decide the case without passing upon that point. It was so expressly stated by the court. No such doctrine was considered or determined by this Court in its decision in 114 U. S. 576.

There was no question of a broad apex extending from one claim to another involved in *North Noon-day Mining Co.* v. *Orient Mining Co.* (6 Sawyer, 299).

The language of the court in that case must be taken as a whole, and its use of the words "every part" of a vein in connection with the term "apex or top" shows conclusively that the court was not considering the effect of a location where the top or apex of the vein was partly upon the plaintiff's ground and partly upon that of the defendant.

Flagstaff Mining Co. v. *Tarbet* (98 U. S. 463) was not a case of a wide vein. The only point there involved was as to the right to a vein passing out the side lines on the strike of the vein. There was no question whatever as to a vein, the top or apex of which was in part outside of the surface lines of the earlier location.

The mineral laws of the United States define the rights of mineral locators with exactness. They provide that a party who has the top or apex of a lode within his surface lines may follow the lode outside of his side lines only where it is shown that the lode in its dip downwards departs from a perpendicular and extends outside the verti-

cal side lines of the surface location. That provision of the statute is consistent with the grant of the possession and enjoyment in its *entire depth* of every lode, the top or apex of which lies *within* the surface lines. The contention that a patent which by courses and distances describes the surface boundaries of the land thereby granted confers upon the patentee the ownership of a vein or lode, the top or apex of which is found by a jury to be not within said surface lines, is utterly inconsistent with the law.

Counsel for the plaintiffs in error have printed with their argument a plat or "plan," which they state approximately shows "the situation of the Shannon and Comanche claims in relation to each other and to the apex of the vein." The apex of the vein is there represented as extending along what purports to be the south side line of the Shannon and the north side line of the Comanche. Upon this showing of the "situation" they argue that the patent on the Shannon claim carried the apex of the vein or lode in its entirety, and defeated the Comanche discovery.

Their present contention in this Court is entirely at variance with what they contended in the court below. There they maintained not that the vein upon which the Comanche claimants relied for a discovery of mineral ran parallel with and was cut by the side line common to the Shannon and Comanche locations, but that the plaintiffs' vein runs *crosswise* of their location, and not *lengthwise*. That point was pressed upon the supreme court of Montana as error requiring the reversal of the judgment of the district court. If the facts are as maintained by the defendants below, viz., that, owing to the course of the vein, the side lines of the Comanche location are really the end lines and the end lines the side lines, it necessarily follows that the true position of the defendants, the plaintiffs in error here, is not that the Shannon patent defeated the

Comanche location because of the right of the Shannon people to follow the *dip* of a vein, the top or apex of which is within their surface lines, but because the holders of the Shannon patent have the right to follow a vein which, on its *onward course or strike*, passes out through the *side lines* of their surface ground. This has never been held to be the law.

We submit that the charge of the court below properly stated the law to the jury.

VIII.

The fifth assignment of errors is that the district court erred in adopting certain findings of fact by the jury, and that the supreme court of Montana erred in affirming the action of the trial court. The ground of the objection is that the findings were contrary to the evidence.

That question cannot be raised in this Court.

Zeckendorf v. *Johnson*, 123 U. S. 617.

Bank of British North America v. *Cooper*, 137 *Id.* 473.

St. Paul Works v. *Starling*, 140 *Id.* 184.

Wilson v. *Everett*, 139 *Id.* 616.

Sturr v. *Beck*, 123 *Id.* 541.

No error having been committed by the court below its judgment should be affirmed.

S. S. BURDETT,
Of Counsel for the Defendants in Error.